Cato Policy Report

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Self-Interest and the Constitution

by Richard A. Epstein

The choice of a constitution rests in large measure upon our conception of human nature. The relation between human nature and human government was well understood by the political writers who influenced the Framers of our own Constitution, but it is often lost sight of today. What I hope to do in this brief essay is to resurrect a lost tradition and to show why we as a nation have gone astray because we have failed to keep a close tab on certain critical fundamentals of political theory.

To the question What is the driving force of human nature with which constitutions must contend?, I give one answer and one answer only: the Hobbesian answer of self-interest. All people are not equally driven, but when it comes to the use of power, those who have excessive amounts of self-interest are apt to be the most influential—and most dangerous. Hence, it is to curb them, not to accommodate benign altruists, that government should be designed. Of course, we must not oversimplify, for it is surely true that, even among the self-interested, all individuals have different natural talents and endowments. Thus, we should not expect that self-interest will manifest itself in the same way in all people. Some people gain more from cooperation; others gain more from competition—hence the organization of firms and the existence of competition (or collusion) between them. But self-interest can express itself in ways other than competition. Sometimes it works through the use of force and violence or the use of deceit. Politics is not immune from these variations that characterize private behavior. If anything, politics brings out the extremes—of both good and evil. Accordingly, we should expect coalitions, competition, confiscation, and violence to be part of the political process, as they are of private affairs. And it is just that array of behaviors and outcomes that we have observed over time.

Richard A. Epstein is the James Parker Hall Professor of Law at the University of Chicago and an adjunct scholar at the Cato Institute.

In This Issue

There is unfortunately no set of institutions which can escape the ravages of misdirected self-interest. The problem, then, is to design a set of institutions which at some real, admitted positive cost curbs the worst of its excesses. In order to design that system of governance, it is not enough simply to condemn self-interest. Such condemnation cuts too broadly, for then there is nothing left to praise. It is necessary, therefore, to distinguish among the different manifestations of self-interest.

One way to clarify the issue is to examine the correspondence between, or the divergence of, the private and the social interest. Competition and violence give very different pictures. Voluntary bargains tend to benefit both parties to trade and, by increasing the store of wealth, tend (with a few minor exceptions—e.g., monopolies) to have positive external effects on the public at large as well. The greater the wealth in the aggregate, the greater the opportunities for third parties to trade with the contracting parties. When one looks at a full array of transactions, therefore, any outsider's particular loss in one case is overridden by the poten-

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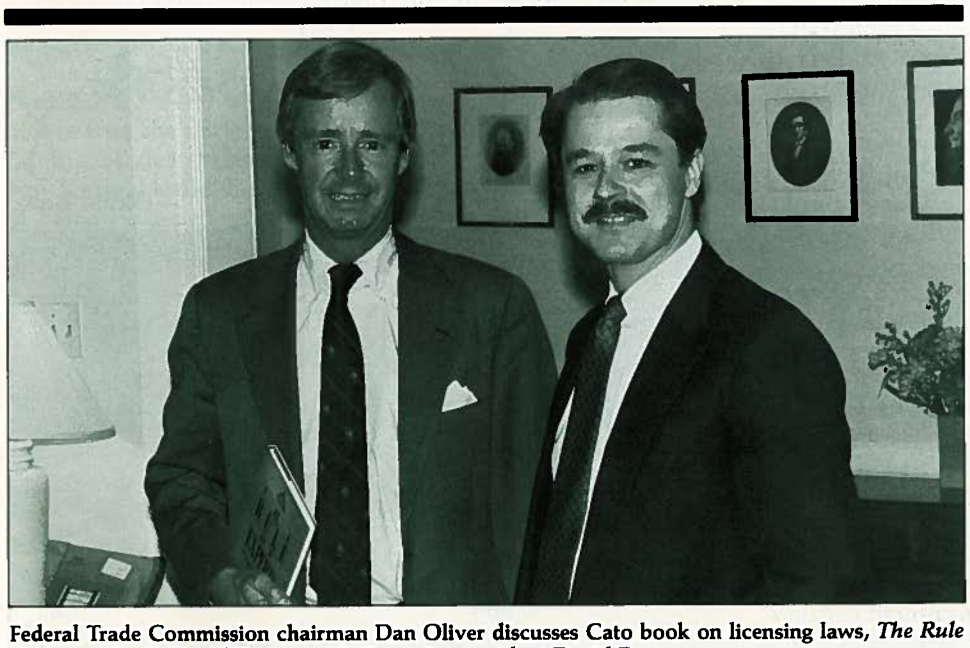


Federal Trade Commission chairman Dan Oliver discusses Cato book on licensing laws, *The Rule of Experts* by S. David Young, with Cato vice president David Boaz.

The Gun behind the Law

Editorial

The picture at the bottom of this page depicts a bank nationalization in Peru. When we Americans hear the words "bank nationalization," we are apt to imagine a piece of paper being signed by a bank president and a deputy assistant treasury secretary. We can thank our friends in Peru for making the meaning of the term a little clearer. What really occurred there is that some people forced other people to give up their property at the point of a gun.

The gun is evident in the picture below, but it is no less real when an American is forced to give up his property by a law or regulation. Such commonly used terms as "national economic policy," "social regulation," "revenue enhancement," "profamily legislation," and "minimum-wage law" all obscure the simple fact that some people are forcing others to do as they're told.

But Peru is not the United States, it will be said; our government would never send riot troops to take over a bank. That is largely because it wouldn't have to—Americans don't resist the demands of government. What would happen if they did?

During World War II Sewell L. Avery, who was chairman of Montgomery Ward, refused to comply with orders from the War Labor Board. President Franklin D. Roosevelt angrily ordered his cabinet to bring Avery into compliance. When Avery continued to ignore federal demands, Attorney General Francis Biddle flew to Montgomery Ward's headquarters in Chicago and ordered soldiers to carry the chairman out of his office. A picture of that unprecedented exercise of federal power made every newspaper in the country. Avery continued to run the business by telephone, however, and eventually President Roosevelt sent the army in to take over Montgomery Ward's books, change the combinations on its safes, and discharge managers who refused to cooperate.

What is unusual about that episode is Avery's defiance. The government's willingness to go to such lengths to enforce its demands stands behind every law, every executive order, every regulation.

Imagine, say, that an orange grower insists on selling all the fruit he grows—in violation of federal marketing orders. Bureaucrats shuffle a few papers and send out an injunction assessing a fine. The grower says he has no intention of paying a fine for the crime of selling nutritious fruit to willing customers and continues to sell his oranges. More bureaucrats enter the picture and order his customers not to buy from him. They ignore the government's orders. Next bureaucrats descend on the farm with cease-and-desist orders, which the grower chooses to ignore.

What happens then? Either the government backs down and allows the grower to continue selling all his oranges, in which case there isn't much point to having marketing orders on the books, or the bureaucrats return to his farm with armed force. They lock the gates, discharge the employees, and keep the grower off his land. If the grower says, "This is my property, and like my ancestors at Lexington and Concord, I'm prepared to defend it," the bureaucrats must be willing to use their weapons to "implement national agricultural policy."

It rarely comes to that, of course, but neither is the threat of violence idle. In 1979, 10 policemen went to John Singer's house in Utah to demand that he stop educating his children at home and send them to a government-sanctioned school. Singer refused and brandished a gun to keep the police off his property. They shot him in the back. In December 1987 the Customs Service asked for permission to shoot down aircraft *suspected* of smuggling drugs, a policy it described as "us[ing] appropriate force" to "ensure compliance."

If more Americans decided to ignore absurd, special-interest, and counterproductive laws, it would soon be apparent that physical force lies behind the *Federal Register*. Does anyone believe that Americans would pay a large percentage of their income to the federal government if not for the ultimate threat of imprisonment and violence?

As the bankers of Peru have learned, every law is enforced at the point of a gun—a fact we should carefully consider when we are tempted to conclude that some perceived problem should be solved by enacting a law.

David Boaz

—David Boaz

Strategic Independence

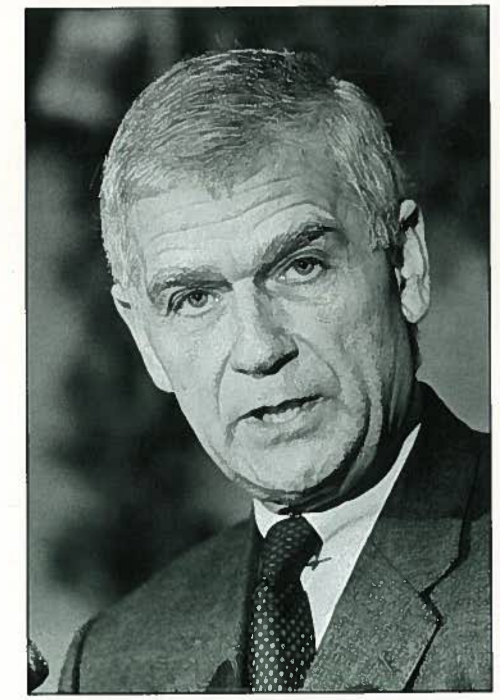
Scholars, Policymakers Debate U.S. Alliances

Twenty distinguished speakers assessed U.S. foreign policy at a Cato Institute conference held at Washington's Hyatt Regency Hotel on December 2–3. The theme of the conference was "Collective Security or Strategic Independence? Alternative Strategies for the Future."

In his opening remarks, Cato foreign policy director Ted Galen Carpenter observed that the basic features of the nation's approach to foreign affairs were formulated more than four decades ago to meet the perceived dangers of a specific global political and military environment, one far different from that of the late 1980s. "Although it would be a mistake to abandon effective policies merely because they are old," Carpenter stated, "it would be an even greater error to cling to obsolete policies because of ossified thinking or misplaced nostalgia."

Carpenter's emphasis on the necessity for change was echoed by other conference speakers. In a luncheon address, former senator Eugene McCarthy noted that America's intervention in the affairs of other nations had become increasingly covert since World War II, depriving Congress and the American people of the opportunity to assess the wisdom of such initiatives. McCarthy warned that closer scrutiny of interventionist tactics was necessary to preserve America's democratic system.

The following day Sen. Mark O. Hatfield (R-Ore.) told a luncheon audience that the nation's strategy of containing Soviet expansionism needed a new focus. Hatfield argued that instead of being obsessed with the military dimensions of containment, the United States must address the festering global social and economic problems that the



Sen. Mark O. Hatfield discusses U.S.-Soviet relations at the closing session of Cato's conference "Collective Security or Strategic Independence?"

Soviets have been able to exploit. In his judgment, provocative actions such as the U.S. naval buildup in the Persian Gulf were especially unwise.

Several conference speakers differed dramatically in their evaluations of America's NATO commitments. Eugene V. Rostow, former director of the Arms Control and Disarmament Agency, insisted that NATO had preserved the peace of Europe for four decades and that no reasonable alternative strategy was available to the United States. Melvyn Krauss, author of *How NATO Weakens the West*, countered that the expensive presence of U.S. troops in Europe undermined the American economy and encouraged the Western Europeans to neglect their own defense. Political scientist Aaron Wildavsky advocated greater burden sharing within NATO, but Cato adjunct scholar Christopher Layne argued that the United States should seize the initiative through creative proposals to end the military division of Europe and phase out the dangerous linkage of America's strategic nuclear arsenal to the security of other nations.

No greater accord existed on the other panels. An especially vigorous disagreement erupted between *Wall Street Journal* writer Jonathan Kwitny and American Enterprise Institute scholar Joshua Muravchik concerning the mer-

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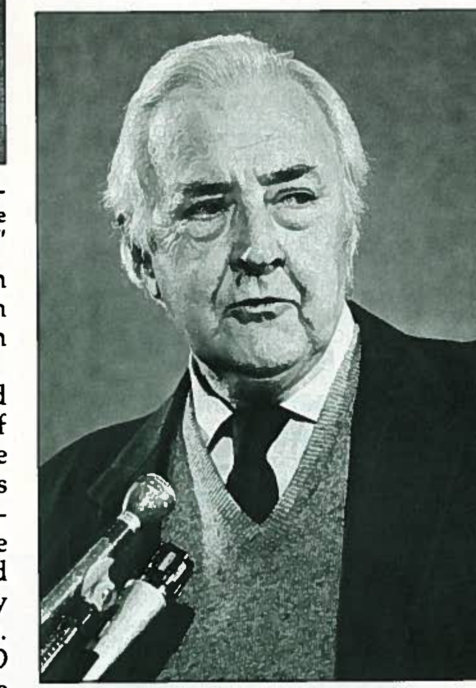

Former senator Eugene J. McCarthy analyzes "Intervention, New-Style" before a luncheon audience at the Cato conference on strategic independence.

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David Boaz . . . . Editor
David Lampo . . . . Managing Editor

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CATO INSTITUTE

Speakers Discuss USSR, South Africa, Land Reform

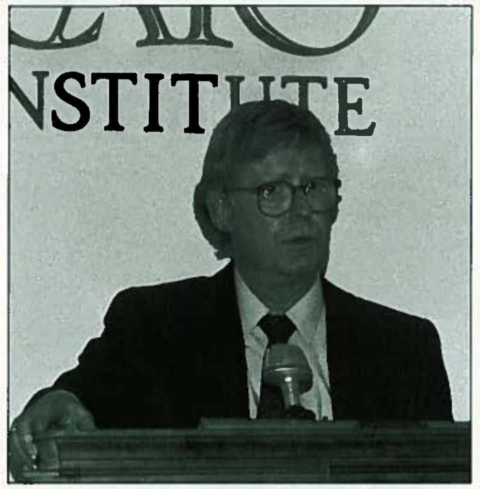
Cato Events

October 22: **"Licensing Broadcasters: Just What the Framers Feared?"** Lucas A. Powe, Jr., the Bernard J. Ward Centennial Professor of Law at the University of Texas and the author of *American Broadcasting and the First Amendment*, argued that licensing of broadcasters has led to all the abuses of power that the Framers of the Constitution associated with licensing of the print media. Sen. Robert Packwood, the ranking minority member of the Senate Communications Subcommittee, commented.

November 3: **"Enhancing America's Energy Security."** Deputy Secretary of Energy William F. Martin discussed the Department of Energy's recent report on the national security threat posed by our growing reliance on Persian Gulf oil. Steve H. Hanke, a professor of applied economics at Johns Hopkins University and an adjunct scholar at the Cato Institute, argued that the United States should not seek to shore up declining oil prices and should appreciate the economic benefits of cheaper oil.

Jack Powelson, coauthor (with Richard Stock) of *The Peasant Betrayed*, discusses land reform in the Third World at Cato Policy Forum.

November 5: **"Seventy Years of Oppression: The Soviet Union, 1917–87."** Human rights under communism was discussed by Soviet defector Alexandra Costa; Paul Craig Roberts, the William E. Simon Fellow in Political Economy at the Center for Strategic and International Studies and an adjunct scholar at the Cato Institute; and Ralph Raico, a professor of history at SUNY College at Buffalo and a Fellow in Social Thought at the Cato Institute.



Robert Hessen, a senior research fellow at the Hoover Institution, predicts the Democrats' new agenda.

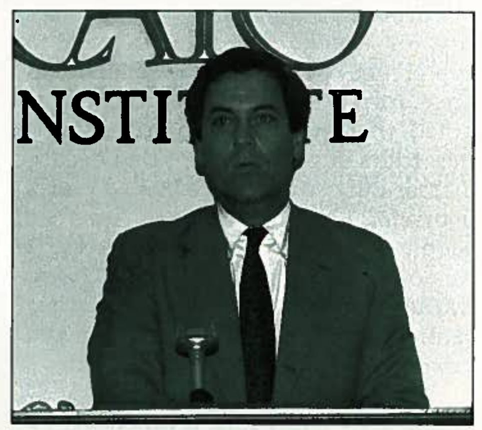
November 10: **"The Peasant Betrayed: Agriculture and Land Reform in the Third World."** John P. Powelson, a professor of economics at the University of Colorado and the coauthor of *The Peasant Betrayed*, contended that most land reform programs have resulted in diminished agricultural production and the exploitation of the peasants they were supposed to help. Montague Yudelman of the World Resources Institute commented.

November 12: **"The FTC Agenda."** At a small policy luncheon, Daniel Oliver, chairman of the Federal Trade Commission, discussed the dilemmas posed by being a free-market advocate at the FTC.

November 18: **"The Agenda of the Left after Reagan."** Robert Hessen, a senior research fellow at the Hoover Institution, argued that the Democrats will need to offer a vision that can compete with "Get the government off our backs." He predicted that under such a theme as "economic democracy" would come proposals for strengthened antitrust laws, increased federal spending, restrictions on mergers, and "independent" directors on corporate boards.

November 19: **"Why We're Going to Legalize Victimless Crimes."** Georgette Bennett, author of *Crimewarps: The Future of Crime in America*, predicted that a number of consensual crimes, including drug abuse, prostitution, and gambling, will be decriminalized because of Americans' growing tolerance—a result of increasing education and affluence—and the need for fiscal austerity in government.

November 30: **"Signs of Hope in South Africa."** Kerry Welsh of Groundswell, a South African public-interest group, discussed the growing interest in a proposal outlined by Frances Kendall and Leon Louw in their book *South Africa: The Solution*. Kendall and Louw prescribe a cantonal system for South Africa, in which virtually all governmental decisions would be made at the canton level. The national government



Cato adjunct scholar Steve H. Hanke of Johns Hopkins University urged the U.S. government not to intervene to shore up the price of oil.

would guarantee civil liberties and a nonracial franchise but would otherwise stay out of cantonal affairs. Welsh noted that a wide spectrum of South African political factions are coming to prefer the cantonal solution to national domination by any particular group.

December 2–3: **"Collective Security or Strategic Independence?"** More than a dozen distinguished foreign policy analysts debated the wisdom of various U.S. alliances and defense commitments at a major Cato conference, held at the Hyatt Regency Hotel. ■

Nonintervention Would Reduce Risk of War

The problem with the strategy of containment has not only been the continuing high costs associated with the requisite military preparations and the occasional egregious costs of heightened crises and regional wars; it has also been the risk, under certain circumstances, of being plunged into nuclear war," writes Earl Ravenal in a new Cato study.

Ravenal, Distinguished Research Professor of International Affairs at Georgetown University and a senior fellow at Cato, concludes that the United States can make large cuts in its military budget "if and only if" containment is replaced by "a policy of strategic disengagement and nonintervention."

"The way we are headed," Ravenal writes, "the U.S. defense budget will be about $530 billion by 1996, and cumulative defense spending during [the 1987–96 decade] will be over $4.1 trillion. Under a noninterventionist policy, the 1996 defense budget would be 58 percent less, and the cumulative cost over a decade would be under $2.6 trillion."

Ravenal argues, "An extensive, engaged foreign policy and a large, active military posture require big, intrusive, demanding government." Less-extensive government requires "a more detached, disengaged foreign policy."

A new U.S. strategy based on self-reliance and war avoidance would include a restricted definition of America's vital interests in the world. It would also "encourage other nations to become self-reliant." Western Europe "could go quite far toward defending itself without American help. It need not be 'Finlandized,' either in whole or in part. If the United States were to withdraw, the principal European countries would probably increase their defense spending gradually, perhaps to 5 percent or 6 percent of their GNP."

Ravenal's study, "An Alternative to Containment," is no. 94 in the Cato Institute's Policy Analysis series and is available for $2.00. ■

"70 Years of Oppression"

Poverty, Human Rights Abuses Are Inevitable Result of Marxism

Economic catastrophe and human rights abuses are an inevitable consequence of Marxism-Leninism, said two speakers at the Cato Institute's forum "Seventy Years of Oppression: The Soviet Union, 1917–87." The forum was held at the Mayflower Hotel on November 5, two days before the 70th anniversary of the Bolshevik revolution.

Paul Craig Roberts, the William E. Simon Fellow in Political Economy at the Center for Strategic and International Studies and an adjunct scholar at the Cato Institute, noted that "in Marx's view, the whole purpose of a social revolution was to get rid of the market." When the Bolsheviks actually tried to implement Marx's ideas, the results were disastrous.

According to Roberts, the Soviets later tried to explain away the debacle by calling it "war communism" and "implying that these efforts to abolish commodity production and institute planning were temporary measures to meet the needs of the civil war."

Roberts quoted Michael Polanyi's 1966 observation "The Russian Revolution, which had conquered power in order to achieve a radically distinct form of economic organization that would be far more productive and also morally superior to commercial man-

Paul Craig Roberts discusses Marxist economic policies at Cato forum on Marxism and the Soviet Union.

agement, has now demonstrated the fact that there is no such possibility."

Historian Ralph Raico of SUNY College at Buffalo, a Fellow in Social Thought at the Cato Institute, argued that the Bolsheviks' attempt to abolish the market was intended to create "an organized society" and indeed to "mold communist humanity out of the human material of the capitalist period."

Raico remarked, "What we have here, in the sheer willfulness of Trotsky and the other Bolsheviks, in their urge to replace God, nature, and spontane-

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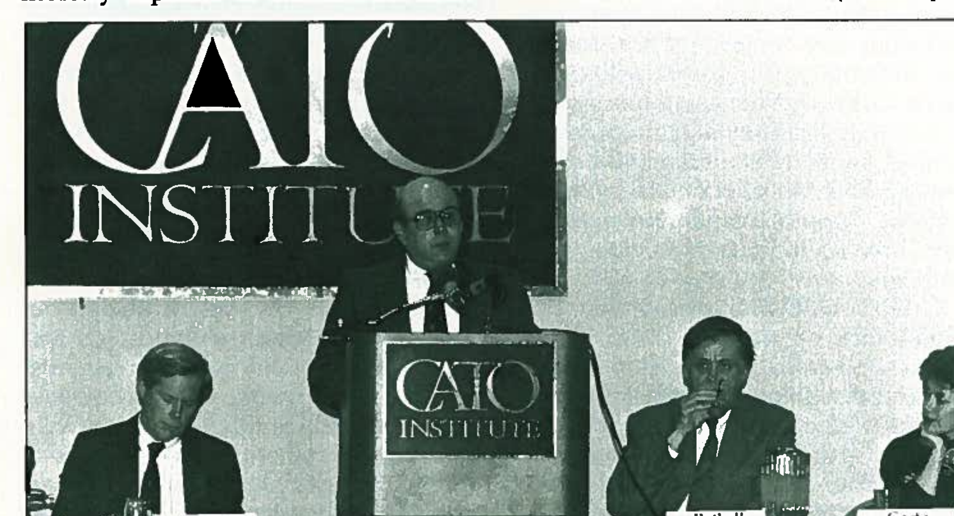


Stalin's policies cost more lives than all the armies of World War I, Cato fellow Ralph Raico told the audience at Cato forum "Seventy Years of Oppression." Paul Craig Roberts, Tom Bethell, and Alexandra Costa listen.

Licensing Broadcasters: Just What the Framers Feared?

Policy Forum

The Cato Institute regularly sponsors a Policy Forum at its Capitol Hill headquarters, where distinguished analysts present their views to an audience drawn from government, the media, and the public policy community. A recent forum featured Lucas A. Powe, Jr., the Bernard J. Ward Centennial Professor of Law at the University of Texas and author of American Broadcasting and the First Amendment *(University of California Press, 1987). Commenting on Powe's talk was Sen. Robert Packwood, the ranking Republican on the Senate Finance Committee and the Communications Subcommittee.*

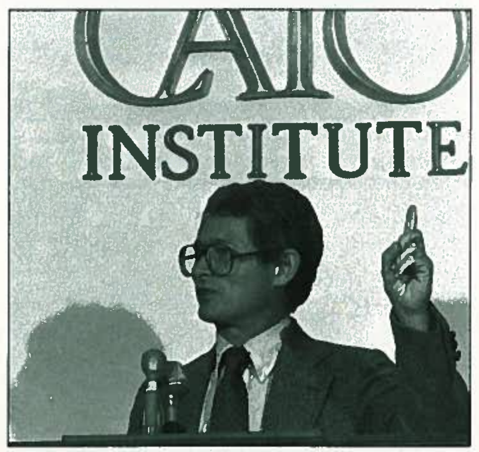
Lucas Powe: The title of this forum seems to reflect an appropriate way to look at some of today's problems—the Framers' insights are worth considering.

A major Supreme Court case in the press area is *Near* v. *Minnesota*, which involved the owner of a Minneapolis newspaper called the *Saturday Press*. Jay Near published lots of stories whose gist was that a Jewish gangster was running gambling, bootlegging, and racketeering in Minneapolis with the tacit consent of the police. The district attorney filed an action against Near under Minnesota's 1924 gag law, and the trial judge, using the language of the gag law, enjoined his paper from publishing any "malicious, scandalous, and defamatory" material. The Supreme Court of Minnesota happily affirmed that decision and pronounced the gag law an effective method of repressing "the evils of scandal," by which it meant those of scandalous newspapers, not scandalous municipal governments.

In 1931 the U.S. Supreme Court, in a landmark opinion by Chief Justice Hughes, reversed the gag law injunction and declared that licensing of the press was illegal, analogizing it to the infamous prior restraints at common law that Blackstone had said had passed from the scene. The Court went on to note, "The administration of government has become more complex; the opportunities for malfeasance and corruption have multiplied." It said that a vigorous press was necessary to check that tendency.

At the exact same time that Jay Near was winning, the Reverend Bob Shuler, who operated a small—1,000-watt—Los Angeles radio station, KGEF, that was licensed to his Trinity Methodist Church, was going on the air two evenings a week with a talk show. It was popular. Indeed, no commercial station in Los Angeles could sell time against Shuler.

Like Near, Shuler saw corruption everywhere—especially in law enforcement in Los Angeles during the Prohibition era—but he had a little more luck than Near did in that respect. The chief of police resigned under pressure, the mayor chose not to run for reelection, and there was other evidence that Shuler was on the right track. As he informed the Federal Radio Commission, his station had "thrown the pitiless spotlight of publicity on corrupt public officials and agencies of immorality." But Shuler's enemies argued that he shouldn't be allowed on the air because he was making unfounded and outrageous attacks, and the commission agreed. It revoked Shuler's license on the grounds that his programs were "sensational rather than instructive."



Lucas A. Powe, Jr.: "The abuses that we would associate with a licensed press have always been with us in broadcasting."

In 1932, just one year after the *Near* ruling, the District of Columbia Circuit Court of Appeals unanimously affirmed the commission's decision to strip Shuler of his license. His freedom of speech wasn't being curtailed, the court said, because he could criticize others as freely as ever. But he could not continue to use the airwaves to do so.

The parallels between the two cases are remarkable. Both Near and Shuler were right on target, if a little overzealous, in their complaints. But Near was allowed to publish; Shuler was not allowed to broadcast. The courts said that the press couldn't be licensed, but broadcasting could.

Virtually every modern historian agrees that the Framers intended the First Amendment to prohibit licensing across the board. Even Leonard Levy, whose books use an extremely narrow interpretation of the Framers' intentions, has written that they wanted to forbid licensing.

But why? What's so bad about licensing? The obvious answer is the potential for abuse, but what kinds of abuses? Well, there will be politically motivated grants of rights. The government's friends will be winners and its foes will be losers. There'll be rule manipulation—the rules will be changed if they don't reflect what the friends of the government think. Finally, there will be a bias toward the status quo; religious as well as political nonconformists will likely be on the wrong side.

The First Amendment was designed to prevent those evils. But the licensing of broadcasting is still allowed, so what have we achieved?

Consider the history of licensing. The Federal Communications Commission stayed in a state of lethargy throughout the New Deal, but in 1939 Larry Fly was appointed chairman of the FCC and some bright young Harvard Law School graduates showed up. A one-sentence memorandum from President Franklin D. Roosevelt to Fly provides the explanation: "Will you please let me know when you propose to have a hearing on newspaper ownership of radio stations?" Roosevelt, reeling from a string of losses that began with the Court-packing plan, had decided to prevent newspaper owners from entrenching themselves in broadcasting and opposing the New Deal, as 95 percent of them had in the 1936 election.

The FCC pressed its case vigorously, but in a display of judicial independence that was rare in that era, the D.C. Circuit Court said no. Although the FCC had to give up, Paul Porter, who was Fly's successor as chairman, noted, "FDR was constantly leaning on me to get newspapers out of broadcasting."

In the 1950s there were thought to be two keys to getting a television license: avoiding concentration in the media and offering good programming. But apparently the real key was having the right politics. One of my favorite examples is the case of Tampa, which had two daily newspapers. Both owned AM radio stations with superior service records. Both applied for a license to operate a VHF television station. Both were opposed by a group with no other media holdings. So the decisions pitted service against diversity in Tampa.

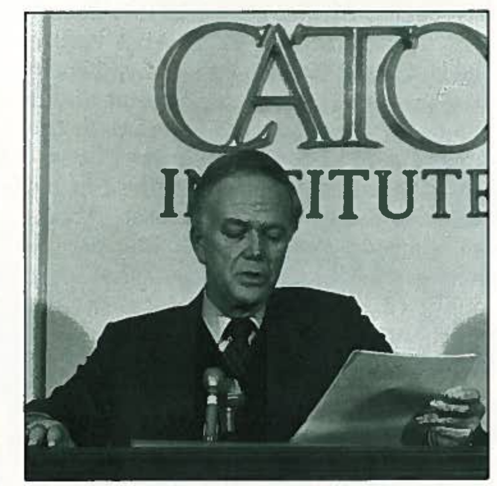
The first decision involved the *Tampa Tribune*—the morning paper—circulation 110,000, not locally owned. It got its license to run a VHF station. The FCC said that local ownership and diversity weren't essential. After all, there were a variety of news sources in Tampa, including 13 newspapers, two of them Spanish-language papers, and there were two other dailies in nearby St. Petersburg. Four weeks later came the FCC's decision on the afternoon paper, the *Tampa Times*—circulation 50,000, locally owned. It lost. All of a sudden diversification was essential. The *Times* was described as one of the two daily newspapers and the largest afternoon paper on Florida's west coast. The other papers in the area were forgotten.

What was behind those remarkable decisions? The *Trib* liked Ike, and the *Times* had the misfortune of having backed Adlai Stevenson. Indeed, during the 1950s only one pro-Stevenson newspaper in the United States got a VHF license in a contested hearing; it had joined forces with a paper that had backed Dwight Eisenhower. Only two newspapers that supported Eisenhower did *not* get VHF licenses in contested hearings; they were opposed by papers that had also supported Ike.

So much for the granting of licenses. How about rule manipulation? Even the equal time doctrine has been manipulated, and it's the easiest rule to avoid manipulating.

Right before the 1956 election President Eisenhower went on national television to discuss America's role in the Suez crisis. When the networks asked the FCC whether to offer Stevenson equal time, it responded that it couldn't answer the question because such complicated legal issues were involved. The networks gave Stevenson airtime, and the FCC instantly ruled that his broadcast was a use of airtime that entitled Eisenhower to equal time to respond.

Contrast that situation with the one just before the election in 1964, when President Lyndon Johnson decided that he needed to appear on national television because Britain and the Soviet Union had changed leadership and China had dropped an A-bomb. It was not a crisis, but nevertheless, he felt the need to address the American people. Not surprisingly, Sen. Barry Goldwater then asked for equal time. Did he get it? Of course not. The FCC explained that Johnson had been discussing unusual events that could affect the welfare of the nation and had been acting in an official capacity. Acting presidential doesn't hurt right before an election.



Sen. Robert Packwood: "The Court has two choices: it can say that all media are broadcast media and will be subject to content regulation or that all media are to be given First Amendment protection."

There have been all kinds of cases involving the manipulation of the Fairness Doctrine. *Red Lion*, which concerned the Democratic National Committee's efforts to monitor right-wing stations, is well known. Less well known is that the FCC's *Mayflower* doctrine, which prohibited editorializing, came out of proceedings against the Yankee Network, a group of right-wing stations that took an anti-FDR tack. During an era when it was rare for anyone to editorialize, those stations were told not to do so if they wanted to keep their licenses.

In the Nixon era the FCC knocked a program called "Loyal Opposition" off CBS—an instance of rule manipulation that had even the then-compliant D.C. Circuit Court muttering. There is no explanation for that finding except a pro-Nixon bias. But the FCC was so subtle that the program was silenced without CBS even realizing that the motive was political.

As for maintaining the cultural status quo, in the 1960s and the early 1970s the FCC lashed out at countercultural language and the first sex shows and managed to knock them off the air. The commission banned song lyrics that allegedly glorified drugs by coming up with a rule so broad that some stations refused to allow their disc jockeys to play Bob Dylan records. Other stations barred songs dealing with the environment. The favorite song of both my children when they were young, "Puff the Magic Dragon," was deemed to promote marijuana use and knocked off the air.

Finally, is anyone surprised that what the Reagan FCC has found really awful in broadcasting is "indecency"? It even singled out one program as being "obscene," a play about two dying AIDS victims telling each other their sexual fantasies over the telephone. That's not surprising either; it's natural to lash out at what you hate, what you fear, and what you cannot understand.

In this talk I have not attempted to make a theoretical case against regulation per se, nor have I belittled the usual rationales for regulation—I've done that in my book. I have not talked about the chilling effects of licensing on newspapers because we don't license them in this country. But if *Near* v. *Minnesota* hadn't prevented us from licensing newspapers and putting them under supervision, the dangers I've pointed out so briefly would seem obvious. Our shared historical background would cause us to say, Yes, licensing leads to abuses. But the abuses that we would associate with a licensed

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Licensing (Cont. from p. 7)

press have always been with us in broadcasting. That's because the very nature of licensing invites the abuses I've discussed. You cannot give the government the authority to question what is aired without creating the risk that such abuses will occur. Thus, if we care about freedom of speech, we should be concerned about the ongoing federal regulation of broadcasting.

Sen. Robert Packwood: I don't understand—well, actually I do understand—why politicians want to regulate broadcast communications. They would regulate newspapers too if we gave them the power to do so.

The problem is the worst at the ends of the philosophical spectrum, the far left and the far right, because zealots are convinced that everything they do is right and that they're entitled to use all the mechanisms of government and government control to carry out their message. But even people who are perfectly rational on other issues seem to think it's all right to conjure up a crisis to justify regulating the media.

I hope that we get a chance to test the Fairness Doctrine and content regulation in court and that the Supreme Court finally says, "We've had enough." The scarcity argument is no longer valid, if indeed it ever was. When the Founders wrote the First Amendment, there were only eight daily newspapers in this country—*that* was scarcity. There were a few street-corner orators and pamphleteers such as Philip Freneau, Sam Adams, and Tom Paine. But the Founders said that freedom of expression was so critical that they didn't care if there were only eight newspapers. Nor did they care that most of those papers were highly partisan and inflammatory. The Founders still wanted to protect them.

Now we have approximately 10,000 radio stations and a total of 1,700 television stations plus cable stations, video cassettes, newspapers, and magazines. There is no scarcity of forums for ideas in this country.

My favorite licensing case involves Simon Geller, who runs a one-man radio station in Gloucester, Massachusetts, and plays classical music all day long. When his license came up for renewal in 1975, it was contested by a company that promised to include public-service broadcasting. Geller said he intended to continue playing nothing but classical music. He proposed the same format under which his license had been renewed several times since 1964. In 1982, after Simon Geller had spent eight years in legal limbo, the FCC took his license away on the grounds that he wasn't serving the area properly.

Now, here are the facts: Gloucester gets more than 40 radio stations, most of which broadcast weather, traffic reports, and the news. But the FCC ruled that Gloucester needed one more station to do the same thing.

The case bounced back and forth between the FCC and the courts several times. Simon Geller finally got his license back, but because of appeals, his legal battles continue to this day.

It is important to know that before the FCC took Geller's license away, there had not been a single complaint about his programming from listeners in the area. There were lots of letters of commendation, and people testified in his favor, but not one complaint. That's an example of the FCC telling people what's good for them and what they ought to hear. The Geller case is the most compelling argument for complete deregulation of the radio-broadcast industry.

If the Supreme Court finds content regulation constitutional, Congress will have to decide whether it is good policy, from the government's standpoint, to have a content doctrine—an equal time rule, a fairness doctrine, and so on. I maintain that it is not good policy, but most members of Congress will support it.

Print and broadcasting are now so intertwined that sometimes it's difficult to tell one from the other. That was the issue in *Tornillo* v. *Miami Herald*. In the early 1970s Florida passed an equal space statute—not equal time, equal space. It stipulated that if a newspaper attacked a political candidate, that candidate would be entitled to free reply space. When Pat Tornillo was running for the state house of representatives in 1972, the *Miami Herald* attacked him. He demanded that the paper print the replies to which he was entitled. When the *Herald* refused, Tornillo sued.

The Florida Supreme Court upheld Tornillo's right to free reply space and rejected the *Herald*'s arguments that the statute was unconstitutional. In reaching its decision, the court said that because newspapers were dependent on electronic media to disseminate the news, the principles enunciated in the *Red Lion* decision needed to be considered in this case. In *Red Lion* v. *FCC* the U.S. Supreme Court said that the special characteristics of the broadcast medium justify the application of a different First Amendment standard than that which is applied to the print media.

The case went to the U.S. Supreme Court, and, without attempting to square its decision with *Red Lion*, the Court dismissed it on First Amendment grounds, noting that print journalism can't be regulated.

One of these days the Court won't be able to avoid the argument that the print media use the broadcast spectrum. Let me read you an exchange I had with Prof. Robert Shayon of the Annenberg School of Communications in a 1987 hearing before the Communications Subcommittee.

Senator Packwood: Professor, you say in your point two, "Scarcity of spectrum space is still an inescapable fact." Correct?

Professor Shayon: Correct.

Packwood: And it is on scarcity that is pinioned the right of the federal government to impose the Fairness Doctrine.

Shayon: Right.

Packwood: Indeed, the *New York Times* and the *Wall Street Journal* do transmit electronically. [That is, they send their signals up via satellite and publish in plants all over the country.] Is that correct, professor?

Shayon: Yes.

Packwood: Are satellite companies licensed?

Shayon: Yes.

Packwood: And they sell space on the satellites?

Shayon: Yes.

Packwood: Could you use the scarcity doctrine to require the *New York Times* and the *Wall Street Journal* to beam up or not beam up certain materials because they're using the spectrum?

Shayon: Well, that's a ticklish point that the courts and the Congress and

the people who study communications are wrestling with right now. We're in a transitional period. It's a gray area.

Packwood: Do you think that we should be able to direct the *Wall Street Journal* and the *New York Times*, if they are using the spectrum, as to what they may or may not do?

Shayon: I think that the spectrum is limited, and if the big users shut out the small users, then the government should act to make fairness the ruling guideline. . . .

Packwood: Under the Fairness Doctrine, could you demand that the *Times* and the *Wall Street Journal*, which are using the spectrum, beam down the stories we tell them to beam? . . .

Shayon: There might be a case to be made for it. The government is not only a repressive factor, it represents the total community and sometimes can be used constructively.

Well, you can see what he's coming to. As I mentioned, one day the Court is going to have to rule on a straight-out use of the spectrum by a print medium. Maybe it will involve using a home computer to punch up the *New York Times*, display it on a screen, and print out an article on a printer. Now, here's my question for the Court: Is that print or broadcast?

It seems to me that the Court has two choices: It can say that all media are broadcast media—they all use the spectrum and electronics—and they will all be subject to content regulation, including newspapers. Or it can say that all forms of communication may involve using the spectrum, but enforcing the First Amendment has priority over regulating the use of the spectrum, and all media are to be given First Amendment protection.

I'll close with a quote from my favorite hearing of all time, and it's not on broadcasting; it's on trucking. The hearing was held four or five years ago before a motor carrier ratemaking study commission, and Prof. Roy Sampson was testifying.

I said, "Professor Sampson, in your prepared statement you indicate that many small truckers don't know how to determine their own costs. Yet there are lots of small truckers that stay in business, so I assume they've got to be breaking even or making a profit. How do they determine their costs?"

Professor Sampson said, "Many of them stay in business by taking the rates that are established by the rates bureau, and many of them don't stay in business. Many of them stay in business and they're losing their shirts, but they don't know it. To use an anecdote, in Oregon, as you know, until the mid-sixties there was no regulation of entry into the log trucking business. It then became regulated, and I personally know a fellow who is a log truck driver, and he would drive long enough to get a down payment on a log truck, and then he would be hauling for himself—and he would think that he was making money so long as he could make the payment on his truck and pay the fuel bill and had a few bucks in the bank.

"Eventually something would happen and the truck would break down, and he would have to get a new truck. He didn't know very much about things like depreciation and opportunity cost and contingency accounts, and that fellow was in and out of the log trucking business as an owner-manager at least three times before he was eventually saved by being regulated out of business."

The professor was absolutely sincere in his statement. That is the mentality of too many members of Congress and too many others who justify regulation on the grounds that it's for the sake of the country, whether it's regulation of broadcast content or entry into the trucking business. "We're doing this for your own good," they say. "You just don't understand what we're trying to do for you. So please quit harassing us with demands that we allow you to say what you want, do what you want, and be what you want on the air, because all you are doing is impeding the otherwise-orderly progress of civilization."

I will continue to fight that kind of mentality by resisting government intervention where none is needed. In the area of broadcasting, that means carrying on the battle to extend to the electronic media the full protection of the First Amendment. You can be sure I will stick with this battle. ■

Self-Interest (Cont. from p. 1)

tial for gain from free trade in a myriad of other transactions. I might wish to stop a voluntary trade between A and B because I hope to sell to A. But if I were forced to decide whether I wish to stop all voluntary sales across the board in order to stop this one, my answer would clearly be no. With the strategic options blocked, I will not forfeit the many opportunities for buying and selling that the system of markets affords to me, along with all others. As a general matter, discrete competitive losses are offset by systematic gains from which everyone—the short-term loser included—benefits. What I want is a special exemption from the general rules. I should not get it.

Violence produces very different social effects than does competition, because one individual's gain is necessarily another's loss. Violence yields no mutual benefits. Further, the third-party effect of violence is to spread fear throughout the general population. There is no reason to think that the total level of wealth or happiness in society will remain constant when incursions on liberty and property are routinely tolerated. Vast resources will be spent on attack and defense, so that the total level of wealth (the social pie) will shrink through the process of coerced redistribution. The negative social consequences of violence stand in sharp opposition to the positive consequences of competition.

There is, then, a functional explanation for the durability of the basic distinction between force and persuasion both in constitutional law and political theory. One obvious way to think of a constitution follows. A constitution should vest in "the sovereign" the task of controlling violence and of facilitating voluntary transactions. Our general success in this task should not blind us to its importance.

Three Limitations on Sovereignty

It is one thing to specify what behavior is legal and what is not. It is quite another to make sure that the rules are observed in practice. For enforcement we turn to the sovereign. But who is the sovereign? Here any neat theory of governance tends to break down in practice, just as all systems do when one searches for a prime mover. It is hard to identify the sovereign. We cannot rely upon the market, that is, voluntary transactions, to police and protect the market. Someone will break from the post, set up shop as a sovereign, and claim and exert a monopoly on force. The risk is that the sovereign's self-interest will render him faithless to his duty to protect the legal order. He will have the position and face the temptation to extract all he can from the citizens in order to improve his own personal condition. For example, rent-seeking in politics is simply a statement that the sovereign, i.e., those fallible people with sovereign power, will allow the citizen a little something so long as he continues to make the sovereign better off. Thus, the sovereign, the supposed solution to the problem of political union, himself becomes the problem. And the issue of constitutionalism is just this: how to constrain the misconduct of the sovereign while allowing him the necessary power to keep peace and good order.

> "The enormous expansion in government power can only be explained by the systematic repudiation of the basic principles of limited government which informed the original Constitution."

Our answer to this problem is limited government. If our task is to limit the power of self-interested individuals, it seems clear that a certain *redundancy* is good for the health of the system. Some barriers may bend or break, and the presence of some back-up protection should merely improve the operation of the system as a whole. The key trick is to make sure that no single individual or small faction obtains or maintains the legal monopoly on force for himself or themselves. Of course, it costs a good deal of money and statecraft to abandon the Hobbesian state wherein everybody is at the mercy of the sovereign, but we can try. Here are three possible limitations on sovereignty: federalism, separation of powers, and entrenched individual rights.

Federalism

First, we should try to maintain competition between the separate governments, as a check to the threat of monopoly. The system of federalism, which was familiar to the Founders because of their colonial experience, represents a profound response to the problem of governance. The individual states are in competition with each other for residents, businesses, and tax dollars. That competition will limit their capacity for the ruinous forms of expropriation that might otherwise take place, at least if the rights of exit and entry across the states are fully preserved in the governing document. This competitive model generally works without direct judicial regulation of the substantive legislation of the various states. But by the same token, it works only if state powers cannot be supplemented by a vast federal power that covers the same domain of economic issues.

The regrettable jurisprudence under the modern commerce clause cases thus becomes critical in this connection because it shows how Justice Hughes (in the Wagner Act cases)[1] and Justice Jackson (in the agricultural production quota cases)[2] had so little understanding of the relationship between government monopoly and private competition that they gave the federal government the trump over local production and employment decisions. By so doing, they weakened the power of private citizens and increased the opportunities for interest-group politics. The power to exit from any given state loses much of its effectiveness when Congress can regulate private market behavior on a national scale. The groups that are bound in state A can no longer escape their restriction by a move to state B, since the federal solution is undercut by a national cartel enforced

at the national level. Federalism as a counterweight to the monopoly sovereign is undercut by the massive expansion of federal power under the commerce clause.[3]

Separation of Powers

The second restraint on sovereignty is the division of power across separate branches at every level of government, each division acting as a check on the powers of the others. This system of restraints was built into the original Constitution, and in large measure it has held. The most controversial element is the judicial, but the case for judicial review is that while the courts do have the power to trump legislation, they lack (or should lack) other powers: they have no power of appointment, no power to levy taxes and impose regulations, no power to declare war. Thus, no sovereign monopoly is conferred upon the judges, even under the banner of judicial activism.

Administrative agencies, which were not a part of the Constitution's original plan, raise a more controversial issue. My view is that they are flatly unconstitutional—there is no article IIIA—and for good reason. Keeping the cost of running government low is not an unalloyed blessing when there is a persistent risk of government misconduct. Forcing all powers into three distinct branches reduces the total size of the federal government and forces those in power to make hard choices about what should be done. The rigid division of power operates, therefore, as another indirect limit on the size of government and hence upon its total power. The modern regulatory state is quite unthinkable without independent administrative agencies, and that is the way it should be.

Entrenched Rights

The last part of the overall system is the direct protection of individual rights. In part this principle is necessary because the exit rights from the states (or for that matter the nation) are simply not powerful enough to overcome all forms of governmental abuse. Local expropriation in land use contexts continues to be rampant, and the formal school segregation in the Old South (and to a lesser extent elsewhere) indicates that local governments do exercise some substantial element of monopoly power, which can be turned in unprincipled fashion against some determinate group of citizens for the benefit of the rest. If the key peril is the inability of democratic political institutions to preserve the rights of minorities, then the problem of entrenched legal rights against both state and federal government is rightly regarded as critical to our entire scheme of government.

> "Federalism as a counterweight to the monopoly sovereign is undercut by the massive expansion of federal power under the commerce clause."

Accordingly, I strongly support limitations upon government power in all areas of life. In addition, I think that the modern distinction between preferred freedoms and ordinary rights is wholly misguided, not because the former receive too much protection but because the latter receive far too little. It is not sufficient to say that the rich can protect themselves by legislation. We are not trying to protect them as such. The concern is social. There is little good to factional struggles that pit industry against industry, rich against rich, or poor against poor. But whatever the configuration of these struggles, the source of concern is social, not private, losses. The defense of private property that I have tried to mount is not a disguised defense of special privilege.[4] I should strike down any legislation that tries to restrict entry to preserve the province of the well-to-do. As Adam Smith demonstrated so long ago, a belief in property and markets is not a belief in mercantilism, high tariffs, and other barriers to trade.

Our basic purpose is to keep the sovereign, that Leviathan, to manageable proportions. That task is not an easy one, because a constitution requires that one make judgments in the abstract, with confidence that they will hold good in the particular cases that arise in the future. That has proved a recurrent difficulty with all substantive guarantees, but not a hopeless one. The ambiguity and error at the margins, be it with property or speech, are well worth tolerating to preserve the core. Over the years we have been able to fashion principles of freedom of speech that control its use as an adjunct to force and fraud, while allowing it the broadest possible sway in other areas. That same generality is applicable in principle to the constitutional protection of contract and property, notwithstanding their shabby treatment at the hands of the Supreme Court.

Recall the observations I made at the beginning of this paper about the effect of ordinary contracts. If they are correct, then we know that voluntary commercial transactions increase the wealth of the contracting parties and generate systematic positive externalities. The use of violence has exactly the opposite social effect. The argument in no way turns on the particulars of the case, such as the type of private contract or the motivation for violence. We have, therefore, the requisite generality to support a constitutional principle. We can protect contract whether we work with labor or capital markets, whether we deal with restrictions on entry imposed by the minimum-wage laws, with restrictions on entry that prevent banks from selling securities, or with rent-control laws. As a matter of first principle, they are all unconstitutional. The details of each case do not alter the general analysis. They only indicate the way in which fundamentally wrong-headed legislation takes its toll in social loss, whether measured in terms of utility or wealth. Decisions such as *Lochner* v. *New York*[5] were correct because New York's maximum-hour legislation was vintage special-interest legislation: successful attempts by certain unions to impose disproportionate burdens upon rival firms that employed different modes of production and hence had different requirements for their workforce.[6]

The principles of substantive due process, or of takings, *do* deserve con-

(Cont. on p. 12)

Self-Interest (Cont. from p. 11)

stitutional status, precisely because they have a generality, power, and permanence that are immune to future shifts in technology or tastes. While there is surely a need to leave to the legislature the decision whether to declare war on some foreign nations, there is no similar reason to suspend judgment when the question is whether one should regulate wages and prices of ordinary labor and commodities.[7] Since that question can be answered in the negative once and for all, there is no reason to leave it open so that legislatures can get it wrong when they succumb to the powerful pressures and blandishments of special-interest groups. There is a powerful normative theory which explains why the protection of liberty and property is good for all ages, and it is that theory which makes it inadvisable to draw the artificial distinction between the protection of speech and the protection of property which is now embedded in the modern law.

Is Constitutionalism Possible?

The above program is an ambitious one. One might ask, therefore, Can all this be done by any constitution? By our Constitution? One's answer in large part depends upon the view one takes of language, of its capacity to guide and inform. If one assumes that all doctrines are mushy, intellectually open, politically adaptable, and morally contestable, then any effort to formulate a constitution is in vain. Sooner or later, and probably sooner, any serious effort at constitutional elaboration will necessarily fall of its own weight. Yet it seems clear that some provisions of our Constitution, most notably those on separation of powers and freedom of speech and religion, have survived the pounding to which generations of cases have exposed them precisely because linguistic skepticism has never dominated judicial approaches to textual interpretation.

I will go further. I think that very few of the wrong steps that have been taken in our constitutional history can be made respectable by celebrating the open-textured nature of constitutional language. In ordinary usage, manufacture does precede commerce; it is not part of it. In ordinary language, there is no watertight distinction between a tax and a taking. In ordinary language, the creation of legislative and executive power does not authorize the use of administrative agencies. I do not want to minimize the interpretive difficulties that arise under the Constitution even when interpreted with an eye to its basic structure and theory. But the difficulties of interpretation cannot explain the current malaise of modern American constitutional law. The remorseless and enormous expansion in government power can only be explained by the systematic repudiation of the basic principles of limited government which informed the original constitutional structure. It is a different political philosophy that lies at the root of the many decisions that have extended the scope of federal (and state) power over individual affairs. The Constitution was drafted by individuals who tried to find a Lockean response to the Hobbesian problem. It has been interpreted by courts and academics who too often forget that big government is often the problem, not the solution. ■

> "The modern distinction between preferred freedoms and ordinary rights is wholly misguided, not because the former receive too much protection but because the latter receive far too little."

Footnotes

This paper was prepared for the plenary session program, "The Idea of the Constitution," at the annual meeting of the American Association of Law Schools, held in Los Angeles on January 5, 1987, and is reprinted, with permission, from the *Journal of Legal Education*, vol. 37, no. 2 (June 1987).

[1] *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

[2] *Wickard* v. *Filburn*, 317 U.S. 111 (1942).

[3] I treat these problems in greater detail in Richard A. Epstein, "The Proper Scope of the Commerce Power," *University of Virginia Law Review* 73 (1987): 1387.

[4] Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (Cambridge: Harvard University Press, 1985).

[5] 198 U.S. 45 (1905).

[6] The bakers employed by Lochner worked longer hours because they both prepared the bread in the evening and removed it from the ovens in the morning, sleeping in between. The larger rival union firms used two shifts of labor and did without sleeping workers. It is worth noting three features of the legislation. First, the maximum-hour legislation invalidated in *Lochner* disrupted Lochner's way of doing business but had no impact on his protected rivals. Second, the maximum-hour legislation was part of a larger package of "reform" legislation that heavily regulated the sleeping conditions of workers, with obviously disparate effects. Third, not all types of bakers were covered. The forces that procured the legislation were able to tailor it so that it did not provoke legislative opposition from other industries with which these union bakers were not in competition. See generally Richard A. Epstein, "Toward a Revitalization of the Contract Clause," *University of Chicago Law Review* 51 (1984): 732–34.

[7] There is only the question of whether the regulation can take place if the compensation is provided to the losers. That compensation will typically not be forthcoming, because the regulation is a negative-sum game. But the possibility of improving overall social welfare is what distinguishes at a constitutional level the use of antitrust laws to control horizontal monopolies from the minimum-wage rules. For a more extended treatment of these issues, see Epstein, *Takings*, especially pp. 274–82.

Call for Papers

The Cato Institute seeks papers on public policy issues for the *Cato Journal*, *Cato Policy Report*, and the Policy Analysis series. Send papers or proposals to Editor, Cato Institute, 224 Second St. S.E., Washington, D.C. 20003.

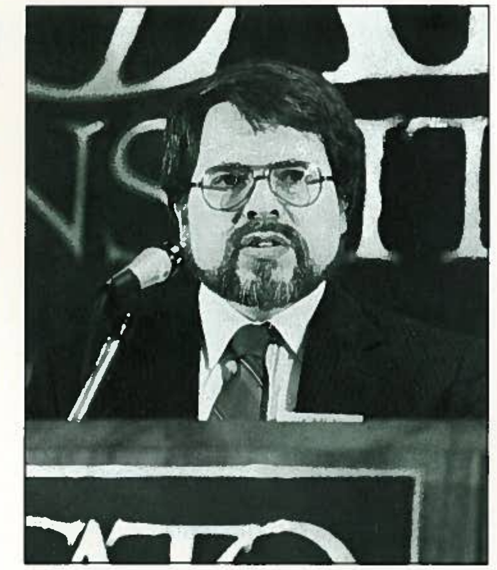
Conference (Cont. from p. 3)

its of U.S. political and military intervention in the Third World. A more subdued exchange of equally diverse views took place among members of the Pacific Basin panel; University of California professor A. James Gregor argued for closer ties with noncommunist states in the region, and Stephen Goose, a legislative aide to Rep. Robert Mrazek, advocated the withdrawal of U.S. forces from South Korea.

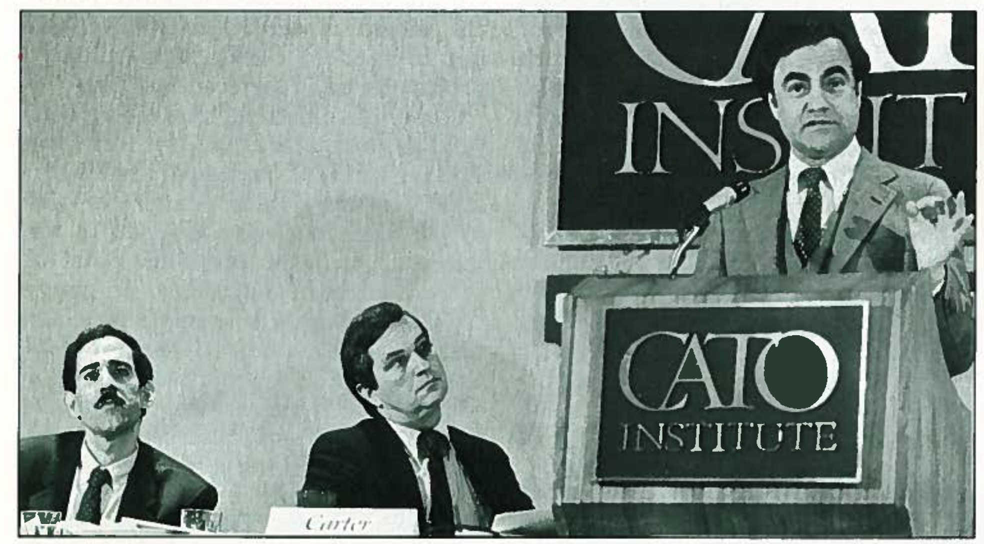
America's once-sacrosanct containment doctrine also proved controversial. Although Princeton University professor Stephen Walt offered "two cheers" for containment, he urged policymakers to focus on identifying the republic's vital security interests more precisely. Cato senior fellow Earl C. Ravenal argued that various constraints had made it extremely difficult for either superpower to order events in the world. If the United States wishes to preserve its economic health and its political freedoms, Ravenal concluded, it must replace the obsolete, burdensome containment doctrine with a strategy of disengagement and war avoidance.

Other speakers at the conference included Alan Tonelson on defining America's legitimate security interests, Peter Schraeder on Washington's response to Third World revolutions, Paul Kattenburg on the prospects for mutual U.S.-Soviet disengagement from the South Pacific and the Indian Ocean, and Terry Deibel on neutralism. In addition to Kwitny, James Chace of the Carnegie Endowment for International Peace, Cato senior fellow Doug Bandow, and former assistant secretary of state Hodding Carter chaired panels.

Several of the conference sessions were televised by C-SPAN and the USA network, and correspondents from a number of newspapers and magazines covered the proceedings. Papers from the conference will be published in book form in mid-1988. ■



Ted Galen Carpenter, Cato's director of foreign policy studies, organized the conference and gave a talk on America's relations with the Third World.



Alan Tonelson of the Twentieth Century Fund and PBS commentator Hodding Carter III listen as Cato senior fellow Earl Ravenal discusses risks and benefits of a noninterventionist foreign policy.

End Military Ties to Korea, Study Urges

The U.S. commitment to defend South Korea costs billions of dollars and increases the risk of American involvement in an Asian war, argues Doug Bandow in a new Cato Institute study.

Bandow, formerly a special assistant to President Reagan and now a Cato senior fellow, writes, "The United States should execute a phased military withdrawal from the Republic of Korea and should sever its defense guarantee once all the troops have been removed." South Korea, "a wealthy nation with the capability to match North Korea's military, should be deemed to have graduated from the American military safety net."

The U.S. military budget designates approximately $50 billion for eastern Asia, of which the ROK's defense accounts for nearly half. South Korea's GNP is already five times as large as the North's, and the gap is widening rapidly. The ROK has acquired the economic base it needs to build adequate defense forces. In addition, the South's population is more than twice that of the North. A five-year phased withdrawal of U.S. troops would give South Korea enough time to offset North Korea's current military advantage.

An American withdrawal, by permitting Washington to reduce military outlays and forcing South Korea—and Japan—to increase them, would make the United States more competitive in the international economic arena. In addition, severing military ties with Korea would ensure that "America would no longer be forced to take sides in South Korea's internal political squabbles or subsidize the defense of a trading rival. Most important, the Korean tripwire, and the consequent threat of U.S. involvement in an armed conflict, would be gone."

Bandow's paper, "Korea: The Case for Disengagement," is no. 96 in the Cato Institute's Policy Analysis series and is available from the Institute for $2.00. ■

Marxism (Cont. from p. 5)

ous order with total, conscious planning by themselves, is something that transcends politics in any ordinary sense of the term."

According to Raico, such "fundamental changes in human nature" as the Communist party's leaders undertook to make require that "absolute political power" be placed in the hands of a few. "During the French Revolution, Robespierre and the other Jacobin leaders set out to transform human nature in accordance with the theories of Jean-Jacques Rousseau," an endeavor that "was surely one of the causes of the Reign of Terror. The Communists soon discovered what the Jacobins had learned: that such an enterprise requires that terror be erected into a system of government."

After discussing the Revolutionary Tribunals, the labor camps, Stalin's forced collectivization, and the terror-famine, Raico indicted the "fellow travelers of Soviet communism" who "lied and evaded the truth to protect the homeland of socialism while millions were martyred."

The third speaker at the forum, Alexandra Costa, who in 1978 became the first person to defect from the Soviet embassy in Washington, discussed why more people don't seek asylum from the USSR. "The Soviet people are very patriotic," she said, "and the idea is put into your head that if you love

Soviet defector Alexandra Costa prepares to answer a question from the audience.

your country, you'll love its government. That link is extremely difficult to dissolve."

Despite having had "more access to foreign books and magazines than 99 percent of the Soviet population," Costa said, she found it eye-opening to come to Washington and begin to read the true history of her country. She expressed great doubts about the extent of Soviet leader Mikhail Gorbachev's reforms. "*Glasnost* doesn't mean 'openness'; it just means 'disclosure' of a few problems. Soviet society is as closed as ever. . . . It is still a one-party country; it is still a country where no opposition or debate is allowed."

Raico's talk, "Marxist Dreams and Soviet Realities," will be published as part of the new Cato's Letters series. ■

Rep. Hank Brown (R-Colo.) met with senior Cato staff members to discuss current issues facing Congress. Brown is pictured here with Ted Galen Carpenter and David Boaz of Cato.

Farm Reform Works in China, Study Says

Western observers should welcome China's economic reforms but should not overestimate them—as President Reagan did in his 1984 reference to "so-called communist China"—says a new study from the Cato Institute.

George Mason University economist David L. Prychitko writes, "China's citizens have prospered under the few markets that have developed. They will not readily give up the few economic freedoms they have gained. Last winter's student demonstrations in the name of democracy suggest that the citizens are prepared to fight for political reform as well. With greater economic freedom comes renewed hope for greater political freedom."

There have been significant agricultural reforms since the death of Mao Zedong in 1976. "Although land is still legally owned by the state, the *right to use* land has been assigned to the lessee. . . . From an economic point of view, land has essentially been privatized. Although it is legally referred to as collective property (clearly for ideological reasons), it nevertheless exhibits a fundamental characteristic of private property—it is controlled through contracting and subletting."

The agricultural reforms have had impressive results. The average annual rate of increase in agricultural output value doubled after 1979.

Three major flaws remain in China's tentative experiment with markets, Prychitko writes: First, prices are still set by administrative edict, not by supply and demand. Second, it is still difficult to fire workers, so they have less incentive to produce efficiently. Third, the Chinese government is still not allowing enterprises to fully benefit from their profits or to fail as a result of showing losses.

Prychitko's paper, "Modernizing Markets in Post-Mao China: On the Road to Capitalism?", is no. 95 in the Cato Institute's Policy Analysis series and is available for $2.00. ■

"Byline" Radio Program Heard on More Than 200 Stations

The Cato Institute's daily public affairs radio program, "Byline," is heard on more than 200 stations nationwide. Commentators include Tom Bethell, Julian Bond, Stephen Chapman, Edward H. Crane, Tom Hazlett, Nat Hentoff, Michael Kinsley, Don Lambro, Earl Ravenal, Joan Kennedy Taylor, and Jeff Riggenbach, who also serves as executive producer. Following are three recent "Byline" commentaries.

Persian Gulf

One of the problems with a 600-ship navy—aside from the enormous cost—is that the admirals get itchy to use it. They whisper in the president's ear that there's a war going on in the Persian Gulf, that there are narrow sea lanes in the Strait of Hormuz, that millions of barrels of oil are affected by the war. That's bad, isn't it? asks the president with furrowed brow. Indeed it is, say the admirals, but fortunately we have 600 ships, so we can go over there and be a part of the war too.

What the admirals don't tell the president, and what the president doesn't know, is that we won the war in the Persian Gulf on the first day of Mr. Reagan's administration—the day he decontrolled the price of oil and thereby effectively destroyed the OPEC cartel. In the late seventies more than 40 percent of the noncommunist world's oil went through the Strait of Hormuz. Today the figure is 15 percent. And even that would be lower if the United States would drop its mindless prohibition against selling Alaskan crude to the Japanese. Today even a worst-case scenario concerning the centuries-old conflict between the warring factions of the gulf would do little more than increase the cost of gasoline at the pump by a few cents.

Still, the admirals would counter, and the president would repeat, if we don't send ships to the Persian Gulf, the Russians will. To which I say, so what? Let the Soviets continue to destroy their own economy with a huge military. Let them further alienate Third World countries that are tired of being manipulated by the superpowers.

Let us be a little smarter and recognize the limitations of geopolitics today, before more innocent young men like the 37 who died on the USS *Stark* are put in harm's way for no good reason.

This is Ed Crane for Byline.

Capital Gains Taxes

Vice President George Bush's latest capital gains tax cut proposal sends a warning shot across the Democratic party's bow.

If Bush is the GOP's presidential nominee, he intends to run on a strong progrowth platform tailored to stimulate the kind of venture capital investment that has made the 1980s the Age of the Entrepreneur.

Bush's capital gains pitch shows he's learned a valuable lesson from his early rejection of Ronald Reagan's 1980 tax cut proposal, an idea he then labeled "voodoo economics."

Congress decided in 1978 to cut the capital gains tax to 28 percent. That unleashed the venture capital which spawned thousands of new high-tech companies—from California's Silicon Valley to Route 128 in Massachusetts. The 1981 tax cuts further reduced the capital gains tax rate, to 20 percent. Sadly, however, Congress decided last year to raise the capital gains tax rate to 28 percent.

The United States now has one of the highest capital gains tax rates in the world and thus the lowest rate of capital investment among the industrial nations.

Bush wants to change this, believing that in addition to encouraging growth and jobs, cutting capital gains taxes will help cut the deficit. The reason is that a lower capital gains rate encourages investments in new enterprises, which in turn stimulate higher tax revenues.

What this country needs is more savings and investment in America. Cutting the capital gains tax will help bring that about.

For Byline, this is Donald Lambro in Washington.

Day Care

The clamor that's been heard all over the nation in recent weeks for a government crackdown on the day-care industry and/or a government subsidy for the day-care industry is easy enough to understand if you assume that the real reason behind it is the desire of politicians and bureaucrats to get more power over the American family. But it's very difficult to understand if you suppose that these people are really interested in helping working parents.

The facts are these:

In order to live decently most couples today find it necessary to hold down two full-time jobs, but that means finding someplace to leave the kids during the day or after school—someplace that doesn't cost so much that it eats up all the profits from one of those two jobs.

This is hard to do, because government has created a shortage of affordable day care. Government has done this by imposing regulations on the owners of day-care centers—regulations that make the cost of operating such centers higher and thus force the owners of such centers to charge parents more.

Do the regulations have any other effect? Not really. They don't prevent unlicensed day-care operators from operating. They don't prevent the emotionally disturbed and the unscrupulous from entering the day-care business. All they do is reduce the supply and increase the price of the day care that's available.

Does this mean that government should use the taxpayers' money to subsidize day care and make more of it available at an affordable price? It's been argued that it's cheaper for the taxpayers to provide a single parent with day care than to pay that parent welfare so she can stay home with the kids. But it would be even cheaper for the taxpayers and more beneficial for working parents if they didn't have to pay for any government intrusion in the day-care business. This is Jeff Riggenbach for Byline. ■

"To be governed..."

The only people in town forced to watch

The eight women and four men watching "Girls of the A-Team" were not there by choice.

The 12 jurors who sat impassively through the sexually explicit videotape will be asked to decide whether that film and three others are obscene and therefore illegal.

—*Washington Post*, Nov. 3, 1987

Famous last words

President Reagan . . . said today that he wanted to make the Veterans Administration a Cabinet-level department. . . .

Officials of the Reagan administration and the agency said the cost of the change would be small. A spokesman for the agency, John Sholzen, put the additional cost at $30,000, for salary increases for the Administrator and other top officials.

—*New York Times*, Nov. 11, 1987

Bob Dole's base of support

After the [Republican presidential candidates'] debate, [Elizabeth Dole] confided, when she and "Bob" returned to their Watergate apartment, they took the dog, a schnauzer named Leader, out for a walk. Cars leaving the nearby Kennedy Center for the Performing Arts, site of the debate, slowed down, she reported, and drivers rolled down their windows and shouted, "You did a great job, Bob!"

—*Wall Street Journal*, Dec. 10, 1987

The real issue

Consumer advocate Ralph Nader yesterday urged President Reagan to convene a conference with D.C. officials to discuss the "accelerating foreign takeover" of office buildings in the city, saying the trend could raise commercial rents and pose a threat to the financial ability of nonprofit groups to continue to rent office space here for lobbying operations.

—*Washington Post*, Nov. 25, 1987

What's the point of being a public servant if you can't have a little fun?

Cora Wilds, chairman of the D.C. Boxing and Wrestling Commission, [contended] that her trips, which have included visits to Venice, Bangkok and Aruba, were necessary "for the improvement of the sport in the city." . . .

The sparring over Wilds' trips, for which the District has spent $23,567 in seven years, took place in a hot crowded hearing room. . . . There were television camera crews recording the event—a level of media interest that rarely attends boxing matches held in the District, which last was host to a championship fight in 1959.

—*Washington Post*, Oct. 21, 1987

Socialism can ruin anything

Pan, Poland's first postwar skin magazine, apparently fills long pent-up needs. Eager readers . . . quickly snapped up the 250,000 first-run issues. . . .

The charms of Miss Marsha, the *striptizerka* (striptease artist) who posed for the photograph, had to compete with the comic-book quality of the magazine's newsprint, which caused ink from the previous page to bleed through all over her body. . . .

"It's a socialist Playboy—gray, tired, no shine," groused Pavel, a 31-year-old Warsaw resident.

—*Chicago Tribune*, Oct. 11, 1987

When things are decided democratically, everyone gets to participate

Her name is Kathleen K. Seefeldt, and, with 12 years' experience, she is the senior member of the Prince William Board of County Supervisors.

By all standard political logic, Seefeldt should be a familiar name in one of the most affluent and well-educated sections of the county. Yet in an informal survey last week of 20 households . . . only one person could name the Democratic incumbent. However, that is one more than could name . . . Seefeldt's Republican opponent.

—*Washington Post*, Oct. 5, 1987

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